Neutral Citation: [2024] UKFTT 00493 (TC)

Case Number: TC09191

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House London

Appeal reference: TC/2020/03389

INCOME TAX – discovery assessments and closure notice – whether assessments overcharge taxpayer – in part – whether extended time limits apply to all aspects of assessment in a period - yes

VALUE ADDED TAX – belated notification penalty, whether there was belated notification – yes – reasonable excuse – no

PENALTIES – classification of behaviours – mixture of deliberate, careless and reasonable care

Heard on: 25 and 26 March 2024
Judgment date: 30 May 2024

Before

TRIBUNAL JUDGE AMANDA BROWN KC
MICHAEL BELL

Between

SHAUN HARTE

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Arenstein of WLH Taxation Ltd

For the Respondents: Paul Marks, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal concerns the following decisions of HM Revenue and Customs (**HMRC**) concerning Shaun Harte (**Appellant**):

(1) A closure notice (**CN**) originally issued on 3 July 2018 pursuant to section 28A Taxes Management Act 1970 (**TMA**) for tax year ended 5 April 2015 in the sum of £86,589.69 but which, pursuant to section 50(6) TMA HMRC, invite us to find that the sum due is £70,933.99.

(2) Six discovery assessments (**Assessments**) all issued on 3 July 2018 pursuant to section 29 TMA for tax years ended 5 April 2010, 2011, 2012, 2013, 2014, and 2016 in the sums of £63,720.62, £76,438.70, £82,393.28, £85,889.04, £85,402.66, £80,115.40 but in respect of which we are invited to find that the sums due are: £58,653.84, £69,808,19, £75,398.76, £78,692.76, £78,736.65, £68,405.40.

(3) Penalty assessments (**Penalties**) issued pursuant to Schedule 24 Finance Act 2007 (**Sch 24**) on 14 May 2020 on the basis that the inaccuracies which are the subject of the CN and Assessments were bought about on a deliberate but non-concealed basis discovery of which had been prompted by HMRC and subject to mitigation of 40% of the maximum permissible amount. Such penalties were assessed at 60% of the potential lost revenue as assessed in the CN and Assessments. In consequence of HMRC's invitation to reduce the CN and Assessments the Penalties are to be commensurately reduced.

(4) A belated notification penalty (**BNP**) issued pursuant to section 76 Value Added Taxes Act 1994 on 24 April 2020 in the sum of £54,609. On the basis that the assumed/calculated turnover was determined by reference to the CN and Assessments a reduction in them will have a corresponding effect on the BNP.

2. As set out in further detail below consequent upon an enquiry into the Appellant's 2014/15 self-assessment tax return HMRC identified four categories of error which they considered led to an insufficiency in the Appellant's self-assessment to income tax. These errors were:

(1) a failure to declare income tax in connection with direct payments shown as received from Tasca Tankers Limited (**TTL**), a company to which the Appellant provided services as a self-employed consultant;

(2) a failure to declare income tax in connection with personal expenses which were met by TTL (having been paid for on the Appellant's TTL credit card);

(3) a failure to declare income tax in connection with substantial but unidentified payments/deposits into the Appellant's bank account from sources other than TTL;

(4) incorrect claims to capital allowances (in respect of a vehicle) and expenditure on rent and rates in connection with a home office.

3. Having so identified the errors HMRC applied what is known as a presumption of continuity and concluded that similar errors are likely to have occurred in the tax years during which the Appellant operated as a self-employed consultant with TTL (including the full tax years 2009/10 to 2015/16). The value of the inaccuracies was assumed to be similar and HMRC adjusted the sum calculated for 2014/15 by reference to the retail price index and assessed in each of the relevant tax years.

4. As indicated, we are invited to reduce the assessments HMRC having accepted that certain deposits they considered to be income had been incorrectly so treated.

5. On the basis that the Appellant had income at the level calculated and assessed taking account of all the errors identified in paragraph 2. above HMRC concluded that the Appellant was liable to be registered for VAT. Initially they calculated the relevant date on which the Appellant was required to be registered as 1 December 2009. That was subsequently recalculated as 1 October 2009. The Appellant was subject to compulsory registration with effect from 1 October 2009 and issued a first long period VAT return covering the period 1 October 2009 to 30 September 2019 (**Return**). The Appellant failed to complete and render the Return with the consequence that HMRC calculated the VAT they considered due by reference to the Appellant's income as calculated in the CN and Assessments. VAT totalling £380,607.67 was calculated as due and was assessed (**Central Assessment**). There has been no appeal against the Central Assessment, we were told, on the basis that there is no right of appeal in respect of such assessments which are issued in absence of a VAT return from the taxpayer. We were informed that the Appellant finally rendered the Return in February 2024, the return was a nil return. As a consequence of the Return having now been rendered the Central Assessment is replaced by the nil VAT Return. The declared amount (nil) will, consequent upon the outcome of this appeal, be considered and, where appropriate, a fresh assessment will be issued. The BNP was calculated by reference to the sums considered due under the Central Assessment.

6. Through the course of the hearing the issues between the parties narrowed. The Appellant accepts that:

(1) There has been some under declaration of income tax in particular he accepts that amounts were received directly into his bank account from TTL which were greater than the amounts declared for income tax purposes. In this regard he accepts that his behaviour was careless and that penalties are due. He does not accept that his behaviour warrants penalties on a deliberate basis or that he should be assessed for accounting periods ending more than 6 years prior to 3 July 2018.

(2) As he is unable to explain the source of some of the other payments received into his bank account he is prepared to accept that they should be treated as income and subject to income tax accordingly. Again he accepts that his failure to declare this income was careless but not that it was deliberate.

7. Accordingly, the scope of the dispute we have to determine is:

(1) Given the appellant's concession in relation to the taxability of other receipts paid into banks accounts, whether three identified receipts (see paragraph 19 below) into the Appellant's bank accounts are income assessable to income tax.

(2) Whether certain items of expenditure met by TTL through use of the corporate credit card and not reimbursed by him represent income in the hands of the Appellant. In particular travel, accommodation and subsistence expenditure whilst the Appellant performed service for TTL in the UK and periodically overseas. In large part the question for us is to determine where the base for the Appellant's business was.

(3) Whether the Appellant is entitled to capital allowances and a deduction in respect of the amounts claimed for his home office.

(4) Whether his conduct in making the accepted and any other errors was deliberate.

(5) How our findings in respect of conduct affect the periods for which the Appellant may be assessed by reference to the extended time limit provisions of section 36 TMA.

(6) Whether it is appropriate to apply the presumption of continuity.

(7) Whether the Appellant has a reasonable excuse for his failure to notify liability to be VAT registered.

8. For the reasons set out below we allow the appeal in part.

BURDEN OF PROOF

9. HMRC bear the burden of proving that they made a relevant discovery and that the discovered loss was bought about as a consequence of the Appellant's deliberate or careless conduct. They also bear the burden of establishing the circumstances which justify the issuing of the Penalties.

10. The Appellant bears the burden of establishing that the CN amendment and Assessments remain overstated in their revised amounts.

11. The standard of proof is the balance of probabilities.

EVIDENCE

12. We were provided with a bundle of documents of 1,063 pages. Overnight between the two days of the hearing we were provided with a Supplemental Bundle of documents which the Appellant wished to introduce. HMRC did not object and therefore we agreed to their admission. We note our thanks to Mr Marks who agreed to assist in the production of the Supplementary Bundle such that it complied with the Tribunal Direction on Electronic Bundles.

13. Mr Marks also provided an analysis of the bank and credit card statements for tax year 2014/15. It is perhaps unfortunate that the assessing officers had not done so/one had not been included in the bundle or by the Appellant who wished to challenge the CN, Assessments and BNP. However, and again with thanks to Mr Marks, the schedule was of material assistance to us.

14. We were provided with the witness statements of Mr Ian Lawler (Officer of HMRC responsible for the CN and Assessments); Mr Riyaz Patel (Officer of HMRC responsible for the Central Assessment and BNP); the Appellant and Ms Vicki Wood (Financial Controller of TTL). All four witnesses also gave sworn oral testimony.

Documentary evidence

15. We note that the documentary evidence was provided to HMRC in a somewhat piecemeal way. HMRC were forced to use their powers to require production of documents and information on one occasion. Other documents were only provided after the CN and Assessments were issued.

16. The documents provided to us were principally the correspondence passing between the parties, copy bank statements from four bank accounts and credit card statements for three credit cards one of which was a corporate Barclaycard.

17. The correspondence enabled us to track the chronology of the enquiry and the decisions which then followed.

18. Two of the bank accounts were joint accounts with the Appellant's partner, one was in the Appellant's name only and the final account was in the name of the Appellant trading as Indox. We were provided with bank statements covering the period from dates in 2012 for the joint accounts and the Indox account and from February 2014 when the sole account was opened to 2016. There were a few missing statement sheets but in the main they provided a complete record of the receipts and payments through the accounts for the tax years 2013/14, 2014/15 and 2015/16.

19. Deposits totalling £182,843.92 were shown in the tax year 2014/15 into three of the bank accounts (the Indox account did not have any deposits in that tax year). HMRC accepted that £19,000 was in respect of a loan from TTL and the Appellant accepted that all but three of the receipts were to be taxed as income. The disputed payments were:

(1) £36,000 received from Flightline

(2) £6,000 received from Paul Donnelly

(3) £27,500 from an unidentified source which was said "may" have come from the sale of a car.

20. As regards the credit card expenditure HMRC had initially treated all expenditure as private expenditure liable to income tax. HMRC had subsequently been prepared to accept that 10% of the expenditure was reimbursement of expenditure incurred on behalf of TTL. Mr Marks' schedule had more particularly considered the line-by-line entries to determine the nature of the expenditure. That schedule indicated which particular items were not considered personal expenditure. As part of our consideration of this matter we relied on the schedule but also considered the underlying credit card statements to assess accuracy of the schedule.

21. We were not provided with any documentary evidence to explain the entries in either the bank statements or the credit card statements i.e. there were no accompanying receipts for expenditure and no invoices in respect of the income from TTL or to explain deposits.

Mr Lawler

22. We found Mr Lawler to be a helpful and honest witness. He gave careful and considered responses to the questions put to him in cross examination. Whilst he had inherited the enquiry after the initial CN and Assessments had been issued he had a good command of the material and could explain the decisions taken by him.

23. Mr Lawler's evidence set out the course of the enquiry as corroborated by the enquiry correspondence.

24. He explained that:

(1) he did not consider that there was adequate evidence to treat the three payments identified in paragraph 19. above as not being income;

(2) the capital allowances had been claimed in respect of a vehicle no longer owned by the Appellant and that there was no information as to the asserted replacement vehicle on which it was appropriate to allow a capital allowance deduction;

(3) he considered that as the Appellant was not based in Belfast but Wakefield where TTL's headquarters are situated no deduction should be given in respect of the home office and in any event £4,800 per annum was excessive; and

(4) on the basis that the Appellant had been self-employed from 2009 and had consistently made the same £50,000 income declaration it was reasonable to apply the presumption of continuity.

25. As to the Appellant's conduct Mr Lawler had personally formed the view that given the size of the under declaration of income, the level of personal expenditure, the failure to notify of a change in vehicle and the size of the home office allowance claimed he had concluded that the conduct giving rise to the insufficiency in the self-assessments was deliberate. He maintained his position in this regard when cross examined. It was put to him that a previous officer, when issuing the penalty warning and human rights letters, had indicated that the Appellant's conduct was careless. Mr Lawler indicated that the previous officer was only

issuing warning letters and may not have fully considered the conduct. However, and in any event Mr Lawler formed the view the conduct was deliberate thereby justifying the use of extended time limits in respect of the issue of the Assessments for 2009/10 – 2012/13.

26. Similarly he formed the view that the Appellant's conduct justified penalties up to a maximum of 70% of the potential lost revenue on the basis that the errors were deliberate but unconcealed and prompted. We were provided with an explanation as to the basis on which the penalty had been reduced in terms of helping, telling and giving. Mr Lawler was cross examined extensively on his decision to limit the reduction given.

Riyaz Patel

27. We found Mr Patel to be honest though somewhat vague. It was plain from his evidence that he had been informed of the Assessments. He had simply accepted, without challenge, how those figures had been calculated and determined the due date for VAT registration.

28. He continued the registration through to 2019 when the return was issued on the assumption that the Appellant continued in business on a self-employed basis in parallel to his full-time employment with TTL from 1 July 2017. In this regard, he did not consider that the Appellant having become an employee provided a reasonable excuse for non-registration. He accepted that in 2017 he had indicated to the Appellant that the Appellant needed to either register for VAT or become employed by TTL but nevertheless had assessed on the basis that there was continuing self-employed income which entitled (or required) the Appellant to be registered for VAT purposes.

Vicki Wood

29. Ms Wood was a straightforward and honest witness. She explained that in the relevant period the Appellant would attend regularly at the TTL premise in Wakefield but that he also travelled extensively. His role was sales and he spent much of his time seeking out new business.

30. She confirmed that she processed invoices from the Appellant for his income and reviewed his credit card expenses. She was clear that no invoices from the Appellant had been provided by TTL because they had never been sought. She implied, but was not asked directly, that such invoices existed.

Shaun Harte

31. Mr Harte too was a straightforward witness, and we were clear that his evidence aimed to assist us. He accepted that he had not given sufficient attention to his tax affairs and should have done so but he stated that he was focussed on developing and growing the TTL business and undertaking other ad hoc work.

32. He provided a coherent explanation regarding the sale of 12 tanker barrels to Flightline. A former contact was moving tanker bases to South Africa and had no need for the barrels. The Appellant knew that Flightline would be interested in taking them so agreed to buy them and on sell. The transaction was undertaken over a few days and was not that of purchasing and holding an asset but a trade. He confirmed that he did not hold any paperwork in respect of the purchase or sale.

33. In connection with £27,500 received in two tranches on 29 September 2014 and 13 October 2014 he said he thought it may have been for the sale of a Mercedes S class. He found the car troubled his sciatica. He recollected that he had sold it to a cattle dealer who operated in Northern Ireland and Eire. He could not explain why there were split payments and accepted he had produced no documentation in respect of the sale.

34. Mr Harte was clear that he had made a personal cash loan to Mr Paul Donnelly a long-term friend of his and that Mr Donnelly had repaid him to his bank account. HMRC put to him that Mr Donnelly was a business contact and in that regard referred the Appellant to an entry in his diary for 7 January 2015. We asked Mr Harte to talk us through all entries on the diary page for 7 January 2015. Despite the diary being over 9 years old Mr Harte was readily able to tell us who most of the people referred to were and decipher the technical information in the diary. We were impressed with the ease with which this was done which went very strongly to Mr Harte's credibility. He was also able to readily demonstrate that his diary was used for personal and business entries. Identifying other personal matters in the diary. He explained that the diary was how he managed his life.

35. A thorough explanation was provided of how Mr Harte operated his business. From where it was conducted and the calls on his time. He explained the work undertaken in respect of bank entries where the payer was identified. From this evidence we were given a reasonably complete understanding of the role he performed when self-employed and providing services to TTL as that business developed and grew.

36. HMRC cross examined and put each of their factual conclusions on the evidence to Mr Harte. He readily accepted that there were failings in his tax accounting but maintained his position on the key issues in dispute in particular that he had not deliberately under declared tax.

FINDINGS OF FACT

37. From the evidence we make the following findings of fact:

(1) The Appellant was self-employed from 2009 until 30 June 2017 his trading activities involved the provision to consultancy services to TTL and other parties together with other ad hoc activities including the sale of plant and machinery/equipment.

(2) The general nature of the business did not vary over the period in which the Appellant traded.

(3) The seat of the Appellant's business activities was in Belfast. His engagements, in particular with TTL, required him to undertake frequent travel to the TTL head office in Wakefield but he would also travel throughout the UK, Eire and periodically overseas. His non-TTL activities appeared generally to be conducted in Belfast.

(4) TTL paid him £300 per month to meet the expenses incurred by him in the running and maintenance of personal vehicles used by him.

(5) The Appellant was issued with a TTL corporate credit card which he used for expenditure that TTL were prepared to reimburse including: travel, hotel, meals and food, fuel, entertaining.

(6) Periodically, the credit card was used for personal purchases. Where TTL considered the expenditure to be personal expenditure in accordance with their expenses policy the sums incurred were reimbursed to TTL.

(7) In each year the Appellant rendered self-assessment tax returns which declared only some of the income received from TTL. In particular income from bonuses, reimbursement of motoring expenses and certain personal expenditure incurred by the Appellant but paid via the TTL corporate credit card was not included on the return. None of the other income received by the Appellant was declared.

(8) In each year the Appellant also claimed expenses in respect of a home office in Belfast and capital allowances in respect of a Land Rover he had owned and used for business and private purposes in 2009.

(9) HMRC opened an in-time enquiry in connection with the 2014/15 tax return on 12 October 2016. During the course of that enquiry HMRC made discoveries of insufficient self-assessment/income which ought to have been assessed but was not assessed in all tax years 2009/10 to 2017/18.

(10) In consequence of the discoveries it was also apparent to HMRC that the Appellant had exceeded the VAT registration threshold. The Appellant was notified of a requirement to serve a long first period VAT return for the period HMRC considered him to have been required to be registered. As a consequence of his failure to render that VAT return they issues an estimated assessment but did not adjust the income in respect of the VAT so assessed. HMRC subsequently accept that an adjustment to income is required in respect of the VAT properly assessable. Our conclusions in paragraphs (11) to (13), (15), (25) and (26) are reached subject to an adjustment for VAT. The figures included in paragraphs 93. to 95. are to the tax due after adjustment for VAT, the figures for such adjustment having been agreed between the parties consequent on our communication of or findings.

(11) The bank statements show deposits totalling £182,843.92 for the tax year 2014/15. Of these the Appellant accepted that the twelve, monthly payments of £4,466,66 (totalling £53,599.92) plus a monthly bonus of £862 (totalling £10,344) received from TTL was properly assessable to income tax. As the Appellant could provide no explanation as to further receipts totalling £41,244 which he accepted as assessable to income tax. HMRC accepted that £19,000 was received by way of a loan from TTL and not therefor assessable to income tax. That leaves a disputed balance of £69,500.

(12) On the basis of the Appellant's oral evidence explaining the payments totalling £36,000 from Flightline we conclude that the payment is income on which income tax is assessable. The Appellant's activities included buying and selling plant and machinery associated with fuelling and the sale of 12 tanker barrels therefore fits within his usual trade. However, we consider that it was an unusually large transaction for his business.

(13) We cannot accept that the sum of £27,500 (split across two payments 14 days apart) was for the sale of a car which was said to have been purchased for £23,000. There is insufficient evidence supporting any such conclusion and even the Appellant was not confident that the sums received were for any car. We therefore consider that there is insufficient to challenge HMRC's reasonable assessment that the £27,500 was income assessable to income tax in 2014/15.

(14) We accept the Appellant's evidence that he loaned Paul Donnelly £6,000 which was repaid on 17 September 2014. Whilst the Appellant's case on this could more strongly have been proven by adducing evidence of correspondence with Mr Donnelly or a short statement from Mr Donnelly we were impressed with the Appellant's review of his diary for 7 and 9 January 2014 and are prepared to accept on the balance of probabilities that the sum was loaned and the receipt on the 17 September 2014 was the repayment of that loan.

(15) By reference to the bank accounts therefore there is assessable income of £157,990.78.

(16) That income figure is to be increased by reference to payments made on the Appellant's behalf through the TTL corporate credit card. By reference to the analysis prepared by Mr Marks we consider it appropriate to treat as private expenditure (and therefore add back as income):

(a) Supermarket and grocery costs - £1,169.68

(b) Aol broadband - £111.72

(c) iTunes - £18.98

(d) Airport lounge access - £430.90

(e) Expenditure with Vodafone - £99.00

(f) Expenditure incurred in Northern Ireland on car repairs - £7,124.22

(g) Petrol expenses in Northern Ireland (subject to the 10% allowance agreed by HMRC) - £3,731.88

(h) As agreed by the parties 15% of the unknown expenditure on the missing pages of the credit card statements - £244.51

(17) The expenditure identified in (16) above is, by its nature, in respect of services supplied to the Appellant (rather than TTL) and used by him in the performance of his services to TTL. The amounts added back as income therefore also represent turnover for the purposes of VAT as they are additional income paid in return for the services provided by the Appellant to TTL.

(18) By reference to the basis on which the Appellant operated throughout the period we consider it likely that similar expenditure was incurred in each year. It is therefore appropriate that for the purposes of the calculation of the BNP (and associated VAT assessment) that the credit card errors be extrapolated for the full period that the Appellant was required to be registered for VAT.

(19) All other items on the credit card list we consider were, on the evidence, incurred only for business purpose. In particular we note that:

(a) the Appellant derived no personal benefit from hotel accommodation for periods whilst the Appellant was out of Northern Ireland;

(b) the items identified as alcohol and restaurants were likely to have been treated as unallowable expenditure by TTL and to treat them as income of the Appellant would effectively tax them twice.

(20) We understand that payments made for certain motor vehicle costs, teeth whitening, solicitors' costs and shoe repairs should be excluded as having been reimbursed by the Appellant to TTL either directly by cash payment or through a loan account. Such expenditure does not therefore fall to be assessed as income.

(21) It is therefore our view that additional income arising in connection with personal expenditure met by TTL is £12,930.89.

(22) On the basis that the Appellant did use his personal vehicle on business (and TTL were prepared to pay £300 per month in this regard) it is reasonable allow an expense deduction against income of £3,600 for the year. Having given such allowance, we consider it inappropriate for any claim to be made for capital allowances.

(23) We therefore find that total income for the year 2014/15 which should have been recorded in box 15 on the Appellant's self-assessment tax return was £167,321.67.

(24) As we have concluded that the Appellant's base was his home in Belfast we consider it reasonable that there be some allowable expenditure in respect of heat, light etc. We consider such expenditure to reasonably have not exceeded £500 in 2014/15. We therefore allow that sum and not the £4,800 claimed.

(25) Total assessable profits for 2014/15 after adjustment for our conclusions on capital allowances is £166,821.67. However, and as indicated in paragraph (10) above that sum requires to be the subject of further adjustment for VAT determined as due in consequence of the undeclared income. As noted above the VAT assessment itself was not under appeal before us. We invited HMRC and the Appellant to calculate and communicate the adjustment required to assessable income in respect of VAT and were informed that the VAT adjustment is £28,486.95. Total profits chargeable to income tax are therefore £138,334.73.

(26) There is evidence in the form of bank statements produced for tax years 2012/13, 2013/14 and 2015/16 which demonstrates that income from TTL and other identified and unidentified sources was received totalling £83,828.45 for 2012/13, £90,596.92 for 2013/14 and £132,242.92 for 2015/16. We find that the sums calculated from the bank account statements represents assessable income in those years.

(27) As to behaviours it is our view that the insufficiency in assessment to income tax arising from the failure to declare income from TTL and other sources can only have been deliberate. The Appellant signed tax returns declaring £50,000 income from TTL in each year when he knew that the payments from TTL exceeded that sum and that there were other sources of income. It is simply inconceivable that anyone receiving income at the level we have found could not appreciate that his tax returns were wrong.

(28) We consider that the errors made claiming capital allowances and expenditure on the home office were careless. We accept that the Appellant gave no thought to what was included on his return by his accountants in this regard, but he failed to tell them he had sold the vehicle on which the capital allowances had been claimed and never sought to understand the other calculations.

(29) As indicated, we have allowed the majority of the credit card expenditure which HMRC had previously considered to be personal as being reimbursement of business expenditure and not income. We note that all but the expenditure identified in paragraph (16) were business expenses within TTL's own policies. In correspondence HMRC accepted that the credit card analysis was subjective/complicated. On that basis and, on balance, we have concluded that the failure to bring them into account as income was a mistake made by the Appellant despite having taken reasonable care.

(30) We consider that the Appellant did provide assistance to HMRC but through the course of the enquiry that assistance (in the form of helping, telling and giving) was limited, HMRC allowed a total of 40% of the difference between the maximum and minimum penalty on the basis of a prompted but unconcealed deliberate error. We consider the allowance to have been reasonable. As regards the errors in claiming capital allowances and expenditure for rent and rates (as adjusted to £500) those same allowances should be applied to careless prompted penalties. No penalties arise in connection with additional income associated with the credit card errors.

(31) The only explanation given for the failure to register for VAT was that Mr Patel had advised that the Appellant had a choice between registering for VAT or becoming an employee and the Appellant had chosen becoming an employee.

LAW

38. The disputes in this appeal are largely factual. However, we must determine, by reference to the facts found, the effect on HMRC's power to assess and the period in respect of which those assessments may be made of our conclusion that (1) the credit card errors arose despite reasonable care having been exercised and (2) the capital allowance and home office deduction errors were careless.

39. The legislative provisions relevant to determination of that issue are sections 29, 34 and 36 TMA. So far as relevant those provisions are:

> **Section 29 – Assessment where loss of tax discovered**
>
> (1) If an officer of the Board … discover, as regards any person (the taxpayer) and a year of assessment:
>
> > (a) that any income which ought to have been assessed to income tax, … have not been assessed, or
> >
> > (b) that an assessment to tax is or has become insufficient …
>
> the officer, … may, subject to subsection … (3) below make an assessment in the amount, or the further amount, which ought in his … opinion to be charged in order to make good to the Crown the loss of tax.
>
> …
>
> (3) Where the taxpayer has made and delivered a return under section 8 … of this Act in respect of the relevant year of assessment he shall not be assessed under subsection (1) above:
>
> > (a) in respect of the year of assessment mentioned in that subsection and
> >
> > (b) in the same capacity as that in which he made and delivered the return unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that the situation mentioned in subsection (1) above was bought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
>
> (5) The second condition is that at the time when an officer of the Board:
>
> > (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return …
>
> the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.
>
> …
>
> **Section 34 – Ordinary time limit**
>
> (1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more than 4 years after the end of] the year of assessment to which it relates.
>
> **Section 36 – Loss of tax bought about carelessly or deliberately**
>
> (1) An assessment on a person in a case involving a loss of income tax … bought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates …

> (1A) An assessment on a person in a case involving a loss of income tax … bought about deliberately by the person … may be made at any time not more than 20 years after the end of the year of assessment to which it relates …
>
> **Section 50 – Procedure**
>
> …
>
> (6) If, on an appeal, it appears to … the Commissioners … by examination of the appellant on oath or affirmation, or by other lawful evidence, that the appellant is overcharged by any assessment, the assessment shall be reduced accordingly, but otherwise every such assessment shall stand good.

40. The only authority to which our attention was drawn in resolving this legal issue was *HMRC v Raymond Tooth* [2021] UKSC 17 (***Tooth***). However, that case set the scope for determining whether conduct was deliberate and, as accepted by Mr Marks, provided only a general context to the issue we have to resolve.

41. Having considered how to resolve this issue we identified the following principal authorities as relevant:

(1) The Court of Appeal judgment in *Hurley v Taylor* [1999] STC 1 (***Hurley***)

(2) the Court of Appeal judgment in *Hargreaves v HMRC* [2016] EWCA Civ 174 (***Hargreaves CA***)

(3) the Upper Tribunal (**UT**) judgment in *Hargreaves v HMRC* [2022] UKUT 34 (TCC)

(4) the UT judgment in *Mullens v HMRC* [2023] UKUT 244.

42. *Hurley* concerned assessments against the taxpayer regarding what the Revenue considered to be under declared turnover arising from two different businesses in which customers often paid cash (a solarium and a used car dealership). In that case the Revenue assessed by reference to a capital statement exercise which they considered demonstrated that the taxpayer must have received additional income which had not been declared. A number of issues required to be determined by the Court of Appeal but relevant to our decision was the question of the extent of HMRC's burden of proof. In this regard the Court endorsed the High Court's statement of the relevant propositions of law, so far as relevant here, confirming that:

> "1. By s36(1) [TMA] an assessment to income tax can be made on a person outside the normal [time limit] "for the purpose of making good to the Crown a loss of tax attributable to his fraudulent or negligent conduct". 2. This requires the Revenue to show: (1) fraudulent or negligent conduct by the taxpayer; and (2) a loss of tax attributable to it. 3. On appeal to the commissioners the burden rests on the Revenue of establishing 2(1) and (2). If they do not discharge that burden the appeal should be allowed … I will call this "the s.36 burden". 4. The burden does not rest on the Revenue to any greater extent than the s.36 burden. If they establish some fraudulent and negligent conduct and some loss of tax attributable to it they have satisfied s36. From then on s50(6) takes over and applies as it does for in-date assessments: that is to say, thereafter the burden rests on the taxpayer to establish that the assessment so wrong. …

43. *Hargreaves CA* concerns a procedural issue. Mr Hargreaves sought to have the question of the validity of the discovery assessment issued to him determined as a

preliminary issue. In that context the Court considered the question as to the nature of the section 29 power and what the taxpayer contended was its draconian effect:

> "*Draconian effect of tiny error?*
>
> 46. Mr Goldberg submits that the power to make a DA is penal in its effect. He submits that, if the taxpayer makes a small mistake, the door is open to HMRC to reopen the computation of all tax for the relevant period. This is because "the situation mentioned in subsection (1) above" (used in subsections (2) and (5)) is that "any income which ought to have been assessed to income tax" has not been assessed. Thus, if the taxpayer had treated income of £100 as not liable to tax, and HMRC assesses the full £100 to tax but HMRC can show that the conduct condition is met only in respect of £50, then on a literal reading of section 29 it would appear to follow that the whole of the assessment meets the conduct/officer condition and is validly made. This is a startling conclusion.
>
> 47. I do not consider that this difficulty exists. I accept the submission of Mr Nawbatt that, once HMRC have shown that the conduct/officer condition is met, the taxpayer can show that the amount assessed is excessive. The position under section 29 is analogous to that where an assessment is made under section 36 TMA on the grounds of the taxpayer's fraudulent or negligent conduct: see per Aldous LJ in *Hurley v Taylor* at page 302F:
>
> [partial quote from *Hurley*]

44. The judgment in *Hargreaves UT* arises following the hearing of the substantive appeal on the validity of the discovery assessment. The FTT had determined that HMRC had met the burden on showing negligent conduct and that the section 29(5) TMA condition had been met. In his challenge to those conclusions Mr Hargreaves submitted, in the context of the section 29(5) TMA condition that by reference to the disclosures made in his return HMRC would have been aware of some insufficiency in his return and as HMRC therefore had awareness of an "actual insufficiency" (as required in the line of authorities starting with *Langham v Veltema* [2004] STC 544) they should be precluded from raising a discovery assessment in respect of all actual insufficiencies in the return. HMRC contended that unless they were made aware of each and every actual insufficiency they had the power to assess.

45. The UT did not consider the point one which was straightforward to resolve but ultimately indicated, by reference to *Hargreaves CA* that HMRC's view was to be preferred:

> 57. In this passage, Arden LJ does not expressly accept the premise of Mr Goldberg's argument set out at [46] of the extract. She states only that its effect was not "draconian" because if HMRC made the assessment of £100 the taxpayer would be entitled to appeal to the FTT and seek to establish that the assessment was excessive. However, it might be expected that, if she disagreed with the premise of Mr Goldberg's submission, she would have said so. Accordingly, we prefer HMRC's submission set out in paragraph [55] above to Mr Hargreaves' competing submission set out in paragraph [54].

46. *Mullens* concerns five discovery assessments and a closure notice issued to Mr Mullens with regard to a number of independent payments made to him across the years of assessment; payments 1 – 3 were made from one source and payments 4 – 6 from a separate but related source. The FTT had found that all payments were income, and that Mr Mullens knew that payments 2 - 5 should have been declared for tax purposes.

47. The UT notes the context of determining the scope of the power to raise a discovery assessment as a result of negligent or deliberate behaviour as:

> "31. The "situation" referred to in subsection (4) is a reference to what has been described as an "actual insufficiency" in the amounts charged to tax (see [33] to [34] of the judgment of Auld LJ in *Langham v Veltema* [2004] STC 544, which considered the meaning of "the situation" in the context of s.29(5)) or the "fact of the undercharge" in *Hargreaves v HMRC* [2014] UKUT 0395 (TCC) ("Hargreaves UT") at [21(6)]). The "situation mentioned in subsection (1)", therefore, is not a reference to HMRC's making of the discovery, as specifically confirmed in Hargreaves UT at [21(6)]. …
>
> 32. More generally, … s.29(4) is <u>not</u> concerned with the officer's subjective opinion but with objective fact (see [21] to [28] of Lewison LJ's judgment in *Hankinson v HMRC* [2011] EWCA Civ 1566). It follows, therefore, that s.29(4) is asking whether the "fact of the undercharge" was brought about by a taxpayer's careless or deliberate conduct: … the amount of the undercharge, are not relevant."

48. In the context of the extended time limits in section 36 the UT states:

> 35. The language of s.36(1) and (1A) (in particular, the references to a loss of tax "brought about [carelessly] [deliberately] by" the taxpayer) mirrors the language of s.29(4). As we have already explained, s.29(4) requires HMRC to show that the "fact of the undercharge" has been brought about by the culpable conduct. If that condition is met for the purposes of s.29(4), the similarity of the statutory language suggests that there would similarly be a "case involving a loss of income tax or capital gains tax … brought about [carelessly or deliberately]" for the purposes of s.36(1) and (1A). In short, there is a clear suggestion that s.36(1) and (1A) do not require HMRC to establish anything more to discharge their Section 36 Burden than they need to discharge their Section 29(4) Burden with the exception of showing, if there is any doubt, the date on which the assessment is actually made. … Our point is simply that, if HMRC have established that the requirements of s.29(4) are met, the language of the statutory provisions suggests that they need to do nothing more to discharge their Section 36 Burden than show that the assessment was made within the 6-year or 20-year period.

49. With regard to the question whether HMRC bear the burden of proving careless/deliberate conduct in respect of the whole under declaration the UT notes that in *Hudson v Humbles* (1965) 42 TC 380 (***Hudson***) Pennycuick J says:

> "It is well established that, where the Revenue makes an assessment which would be out of time apart from the proviso to Sub-section (1), the burden lies upon the Revenue to establish that some form of fraud or wilful default has been committed by the taxpayer in connection with or in relation to Income Tax. If the Revenue succeeds at this stage, the burden then shifts to the taxpayer to displace the assessment - for example, on the ground that it is excessive in amount […]". (quoted at paragraph 45 of *Mullens*)

and

> "I do not think it is necessary for the Revenue, in order to raise a prima facie case, to show the particular quality or source of the receipts which had not been accounted for." (quoted at paragraph 47 of *Mullens*)

and finally,

> "The taxpayer knows the full facts, and the Revenue does not. In the nature of things, it must often be the case that, even if the Revenue can show a prima facie case that receipts have not been satisfactorily accounted for, it has no material upon which to set up a prima facie case for bringing the receipts in question under one or other source of income. On the other hand,

> it is always open to the taxpayer to challenge the assessment, not only on the ground that there has been no wilful default but also on the ground that the receipts did not represent income from the particular source selected by the Revenue." (quoted at paragraph 49 of *Mullens*)

50. At paragraph 48 the UT summarises the view that the effect of *Hudson* is HMRC will have met the burden on them (under section 29 and 36) provided that shows a prima face case of income tax not being paid as a result of careless or deliberate conduct before the burden shifts to the taxpayer to show why the assessment is incorrect.

51. The UT proceeds to consider the judgment in *Johnson v Scott* [1978] STC again concluding, at paragraph 53, that all that is required is for HMRC to show careless or deliberate conduct. Once shown the door is opened to making a competent assessment which the taxpayer must then displace.

52. Having considered *Hurley* the UT states:

> "62. … As we have explained, establishing that a taxpayer has behaved fraudulently or negligently in relation to tax affairs necessarily requires it to be established that some tax is unpaid as a consequence of the culpable conduct. When *Hurley* is read as a whole, it is clear that Park J was concerned with the same issues that arose in *Hudson* and *James*, namely whether the Revenue needed to prove the taxability of particular items of income for particular years … or whether they could discharge their burden by presenting a prima facie case, based on capital statements, that the taxpayer did not adequately answer. …" (emphasis added)

DISCUSSION

53. We set out at paragraph 7. the issues we needed to determine. As indicated some are determined on the facts, one is a pure issue of law. It is convenient to deal with each in turn.

Whether three identified receipts into the Appellant's bank accounts are income assessable to income tax.

54. By reference to our factual findings at 37.(11) to 37.(15) we determine that the payments of £36,000 from Flightline and £27,500 (unidentified) were income assessable to income tax in 2014/15 (**Bank Statement Insufficiency**). However the receipt from Paul Donnelley was not income so assessable. Accordingly, receipts into the bank account assessable to income tax in 2014/15 was £157,990.78.

Whether certain items of expenditure met by TTL through use of the corporate credit card and not reimbursed by him represent income in the hands of the Appellant. In large part the question for us is to determine where the base for the Appellant's business was.

55. We have determined on the evidence that the Appellant based his business in Northern Ireland for the reasons set out in paragraph 37.(3).

56. By reference to our findings at 37.(16) to 37.(21) personal expenditure not previously adjusted for (by way of reimbursement by the Appellant to TTL) totalling £12,930.89 must be added to the assessable income in the bank account (**Credit Card Insufficiency**).

Whether the Appellant is entitled to capital allowances and a deduction in respect of the amounts claimed for his home office.

57. We have determined on the facts (see paragraphs 37.(22) and 37.(24)) that the Appellant is not entitled to the deductions made in his return in respect of either his personal vehicle (£2,400 capital allowances) (**Capital Allowance Insufficiency**) or the home office (£4,800 deductible expenditure) (**Deductible Expense Insufficiency**). Rather we have

determined to allow deductible annual expenditure of £3,600 for motoring expenses and £500 for the home office.

Whether his conduct in making the accepted and any other errors was deliberate.

58. Our findings as to the Appellant's behaviours are as set out in paragraph 37.(27) to 37.(29).

59. We consider him to have deliberately failed to account for income received into his bank account.

60. However, we consider that he carelessly permitted his accountants to make claims to capital allowances and over claimed expenditure for his home office.

61. We consider the errors arising from personal expenditure on the credit card to have been made despite reasonable care having been taken.

62. We address below at paragraphs 65. to 78. the consequence of these conclusions on the Discovery Assessments and Closure Notice.

63. However, in terms of the penalties our findings have the effect of reducing the quantum of the penalties in each year. Pursuant to Schedule 24 paragraph 1 the penalties are calculated on an inaccuracy-by-inaccuracy basis and by reference to the potential lost revenue (calculated in accordance with paragraph 6 of Schedule 24) arising from the particular inaccuracy. HMRC confirmed that each aspect of this appeal was a separate inaccuracy (this despite both the bank account receipts and the credit card expenditure leading to an inaccuracy in income declared in Box 15 of the self-assessment tax return).

64. As we consider the reductions given by HMRC are reasonable the penalty position is as follows:

(1) For the inaccuracy arising from a failure to account for income received into the bank accounts the penalty is correctly assessed as 60% of the potential lost revenue. The penalty is calculated at that sum as it represents a reduction of 40% between the statutory maximum penalty (70%) and an adjusted minimum penalty of 45%. The statutory minimum penalty for a promoted deliberate error is 35% however, as a matter of practice HMRC do not apply the statutory minimum where an error is identified/disclosed more than three years after the tax year in which the error was made. HMRC therefore applied the 40% reduction to the difference between a 70% penalty and a 45% penalty. We agree that the adjustment of the minimum penalty for delayed disclosure, and thereby to the penalty calculation to be reasonable.

(2) As the Capital Allowance Insufficiency and Deductible Expenditure Insufficiency was careless but prompted the maximum penalty is 30% and the statutory minimum is 15%. As with (1) above the statutory minimum is, as a matter of policy, adjusted by HMRC where disclosure if made more than three years after the tax year assessable, the minimum applied in such circumstances is 25%. As above we consider such adjustment to the minimum penalty to be reasonable. With a 40% reduction the rate of penalty for which the Appellant is liable is 28% of the potential lost revenue.

(3) No penalty is due in respect of the inaccuracy arising from the Credit Card Insufficiency.

How our findings in respect of conduct affect the periods for which the Appellant may be assessed by reference to the extended time limit provisions of section 36 TMA.

65. The Appellant contended that if we found that his conduct was not deliberate in any regard then the assessments should be reduced to exclude from the charge to tax any amounts

which were not brought about by either deliberate or careless conduct. In this regard it was noted that HMRC had not sought to defend any part of the Discovery Assessments on the grounds that they met the section 29(5) TMA condition. It was also contended that the Discovery Assessments for tax years 2009/10 – 2011/12 overstated the tax due to the extent that they included amounts which had been bought about by careless as distinct from deliberate conduct.

66. HMRC contended that once deliberate conduct had been established in connection with an insufficiency arising in the entry into box 15 on the self-assessment tax return (i.e. the Bank Statement Insufficiency) HMRC could competently assess under section 29(4) TMA for both the Bank Statement Inefficiency and the Credit Card Inefficiency whatever our conclusion as to the conduct giving rise to the Credit Card Inefficiency and that the 20-year time limit provided in section 36(1A) TMA applied.

67. During the hearing it was put to HMRC than in other cases on which I (as opposed to we) have sat HMRC had conceded that where a taxpayer had proven that a mistake had been made despite reasonable care a discovery assessment should be reduced. Mr Marks contended that a reduction may be appropriate if the insufficiency to which section 29(4) conduct was attributed was of a different nature to that in which the taxpayer had taken reasonable care but here both the Credit Card Insufficiency and that arising from the bank statements led to an error in box 15 on the return and therefore should not be reduced.

68. We understood HMRC's position on the Capital Allowance and Deductible Expense Inefficiencies to be that it may be possible for there to be a reduction because they concerned boxes 21 and 57 on the basis of careless conduct.

69. We have not found this an easy issue to resolve. Whilst we have the authorities referred to above (all of which are binding on us) they all seem to stop just short of the question we need to answer.

70. We start by considering the judgment in *Hargreaves CA*. The hypothetical scenario considered by Arden LJ was one in which a taxpayer had treated £100 as not liable to tax in their self-assessment, but HMRC could only show deliberate/careless behaviour in respect of £50. It was contended on behalf of Mr Hargreaves that on a literal interpretation of section 29 TMA HMRC would appear to be entitled to establish the validity of a discovery assessment in respect of the full £100 by demonstrating deliberate/careless conduct in respect of only half of it. That outcome was described as startling.

71. As noted in *Hargreaves UT*, in response, Arden LJ does not expressly accept the literal interpretation of section 29 TMA advanced by Mr Hargreaves. However, the UT proceeds on the basis that it more likely that Arden LJ accepted that section 29 TMA did provide for assessment, using Mr Goldberg's example, for £100 where HMRC could show a prima facie case for an insufficiency (in that example £50 (**Insufficiency 1**)) and condition within section 29 (be that subsections (4) or (5)) in respect of that insufficiency. On that basis the UT accepted HMRC's submission that they could raise a valid discovery assessment in respect of both income and capital gains tax insufficiencies on Mr Hargreaves (contrary to the position taken by Mr Marks in this appeal).

72. We understand this to have been because the "situation" in section 29(1) TMA is an actual insufficiency and, in the hypothetical example HMRC were able to prove Insufficiency 1 and conduct within section 29(4) TMA. As a consequence, a taxpayer faced with the £100 assessment could not challenge the validity of the assessment as a whole and have it set aside simply because HMRC had not proven the statutory conditions to raise a discovery assessment in respect of Insufficiency 2.

73. However, in *Hargreaves UT* does not expand its thinking (because it did not need to) on the basis in which Arden LJ was satisfied that despite HMRC having the ability to raise a competent assessment in respect of Insufficiency 2 the draconian effect which concerned those representing Mr Hargreaves did not arise given the taxpayers ability to challenge the assessment as excessive.

74. *Mullens* adds analysis particularly in the context of the relationship between the statutory conditions in respect of which HMRC bear the burden for an extended time limit discovery assessment. However, it also provides some additional narrative on the circumstances in which a taxpayer can challenge a discovery assessment once the burden of proof passes to them. In the quote from Pennycuick J in *Hudson,* in paragraph 49 of *Mullens* (see paragraph 52. above), it is apparent that one of the bases of challenge could be "that there was no wilful default" in respect of one of the sources of income.

75. By reference to the UT analysis (in *Hargreaves UT* and *Mullens*) we conclude that paragraph 47 of *Hargreaves CA* is to be read as determining that the statutory conditions to raise a discovery assessment will be met in the scenario hypothesised by Mr Goldberg where HMRC have prima facie evidence in connection with Insufficiency 1 even though there is a further insufficiency of £50 (**Insufficiency 2**) in respect of which HMRC have not demonstrated section 29(4) TMA conduct. In accordance with section 50(6) TMA the assessment will stand good unless the taxpayer can bring evidence to show that the assessment of Insufficiency 2 is wrong/excessive/incorrect (this language being used across the cases) and thereby overcharges him to tax.

76. On the basis that Arden LJ was confident that the difficulty associated HMRC's ability to assess for all identified actual insufficiencies in a period despite having only to show deliberate/careless behaviour in respect of some of the insufficiency and as confirmed in *Hudson* we consider that it must be open to the taxpayer, when the burden shifts to them, and in order to show that the assessment is excessive, to positively demonstrate on the evidence that, in this example, Insufficiency 2 was not bought about by deliberate/careless conduct and thereby to assess for it overcharges the taxpayer. In this context we consider that is the case because Insufficiency 2 is not itself an insufficiency which could justify the raising of a discovery assessment.

77. In the present case HMRC met the burden on them to establish a prima face case that the Discovery Assessments are valid applying the extended time limit provisions by showing that the conduct giving rise to the Bank Statement Inefficiency was deliberate and conduct giving rise to the Capital Allowance and Deductible Expenditure Insufficiencies was careless. However, we are satisfied on the evidence that there was no deliberate/careless conduct in respect of the Credit Card Insufficiency such that the Appellant would be overcharged to tax in respect of it. Accordingly, in exercise our powers under section 50(6) TMA we remove that part of the Discovery Assessment that relates to the Credit Card Insufficiency.

78. We reach a similar conclusion in respect of the Capital Allowance Insufficiency and the Deductible Expenditure Insufficiency in tax years 2009/10 – 2011/12. Those tax years require the extended time limit provided for in section 36(1A). As the Appellant has demonstrated, on the evidence, that the conduct giving rise to these Insufficiencies was careless and not deliberate we consider to effectively assess on the basis that the errors were deliberate is to overcharge the Appellant. Plainly however, the 6-year time limit in section 36(1) TMA applies to these Insufficiencies.

Whether it is appropriate to apply the presumption of continuity.

79. We have found that HMRC have reasonably concluded the presumption of continuity to apply such that HMRC made a discovery that income tax had been insufficiently assessed

in each year 2009/10 – 2017/18 whilst the Appellant was a consultant to TTL and carried on certain other ad hoc business activities as a sole trader.

80. HMRC did not assess for 2016/17 or 2017/18. No explanation was given for this. HMRC confirmed that they would or could not now seek to do so. In our view that concession was correctly made. By the time the enquiry window closed for each of those years HMRC were sufficiently aware of the issues arising including that the Appellant was at least careless and, had they wished to protect their position, could (and in our view should) have opened an enquiry into those years. Strictly the power to assess under section 29(4) TMA is not contingent on HMRC being unaware of the careless behaviour during the enquiry window and, following *Tooth,* the discovery that the Appellant was at least careless does not go stale. Strictly therefore HMRC may have the power to issue assessments for those later periods however, we would consider it unconscionable for them to do so.

81. In evidence Mr Lawler confirmed that it was HMRC's practice to accept direct evidence of under declaration in preference to estimating quantum by way of extrapolation. In this case HMRC have complete bank statement records for 2012/13, 2013/14 and 2015/16. In consequence, we consider that the appropriate basis for assessment for each of 2012/13, 2013/14 and 2015/16 is to take the income receipts shown in the bank account statements for each year. For the reasons given above the Credit Card Insufficiency is not assessable by way of Discovery Assessment. From the figures shown on the bank statements allowable deductions of £3,600 per annum vehicle expenses and £500 per year home office expenses should be given. We consider that these adjustments do not require adjustment for RPI on the basis that for the motoring expenses figure reflects the payments made by TTL which we understand did not vary over the period and the home office allowance is so small that it is reasonable to apply it to 2012/13, 2013/14 and 2015/16.

82. On the basis that we consider it reasonable to conclude that the Bank Statement Insufficiency was also made in tax years 2009/10 to 2011/12 and absent complete bank statement information for those tax years it is appropriate to apply an RPI adjustment to the 2012/13 income calculation to determine the assessable amount for 2009/10 – 2011/12.

83. As regards the Capital Allowance Insufficiency and Deductible Expenditure Insufficiency, as we have concluded that the errors were careless HMRC may only assess up to six years and may not therefore assess to recover those adjustments for 2009/10 – 2011/12.

84. The apparent effect of our conclusion at paragraphs 37.(22), 57. and 83. would, on the face of them result in the Appellant being entitled to an income deduction of £3,600 in 2009/10 – 2011/12 but preclude HMRC from assessing for the associated Capital Allowance Insufficiency. In the circumstances we consider it reasonable therefore to restrict the adjustment/deduction for car expenditure in those years to £1,200 thus ensuring that the discovery assessments for those years do not give an unwarranted bonus to the Appellant and ensure the correct tax is assessed. We do so, as far as necessary in accordance with our powers under section 50 TMA.

Whether the Appellant has a reasonable excuse for his failure to notify liability to be VAT registered.

85. In consequence of our decision on the Appellant's income tax liability it is plain that he was required to be registered for VAT.

86. Although the question of the VAT assessable in consequence of his liability to be registered was not before us we note that our factual conclusion at paragraph 37.(17) and 37.(18) carries the consequence that the Credit Card Insufficiency represented undeclared turnover for VAT purposes in the period from 6 April 2014 to 5 April 2015. Our conclusion

that such income was not assessable under the discovery assessment provisions of section 29 TMA there is nothing to preclude the assessment of an extrapolation of such turnover for VAT purposes.

87. By reference to the additional income, also representing turnover for VAT purposes the Appellant's liability to register for VAT arose on 1 March 2009.

88. There was no dispute as to the law on reasonable excuse. In brief summary a taxpayer will have a reasonable excuse for failure to register where the failure to do so was objectively reasonable by reference to the attributes and situation of the taxpayer in question (see *Perrin v HMRC* [2018] UKUT 156 (TCC).

89. The only excuse advanced by the Appellant was that he considered that Mr Patel had told him in 2017 that he had a choice either to become an employee of TTL or become VAT registered.

90. With respect to the Appellant that excuse can only be relevant as an explanation for why he did not register in 2017 after commencing employment with TTL. As we have found that the Appellant's business ceased upon his becoming an employee the necessary conclusion which follows is that his liability (and indeed entitlement) to register for VAT purposes also ceased in July 2017. No excuse is needed beyond that date. Had the Appellant had a continuing liability to be registered for VAT purposes we would have needed to consider more fully the circumstances and detail of what the Appellant was told but in the circumstances that is not necessary.

91. As the Appellant provided no explanation or excuse other than that he had not paid sufficient attention to his tax affairs in the prior period we must find that there is no reasonable excuse for the failure to register such that a penalty of £21,642.12 representing 15% of the Appellant's turnover in the period for which he was not registered. No reduction can be given for input tax which may have been deductible in the period as the Appellant has made no evidenced claim to recovery.

DISPOSITION

92. The appeal is allowed in part.

93. Of the £560,589.39 originally assessed to income tax we find that £107,344.34 is due.

94. Of the £336,353.61 originally assessed in inaccuracy penalties £58,089.38 is due.

95. Of the £54,609 originally assessed by way of belated notification penalty we find that £21,642.12 is due.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

96. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date: 30th MAY 2024